BANK UTAMA (MALAYSIA) BHD

v.

CHAI KOH SHON & SONS SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD J
[ORIGINATING SUMMONS NO: 24-211-1998]
8 OCTOBER 2002

LAND LAW: *Sale of land - Order for - Land Code (Cap. 81) of Sarawak, s. 148 - Application to set aside - Delay in application to set aside - Whether application an abuse of court process - Whether application to be dismissed*

The defendant had charged two pieces of land ('the said lands') to the plaintiff in consideration for an overdraft facility granted to a third party ('the borrower'). It was agreed that the defendant would repay all the sums due and owing by the borrower. The borrower subsequently failed to regularise the amount overdrawn by him. After their notices of demand sent to the borrower and the defendant were returned 'unclaimed', the plaintiff commenced foreclosure proceedings and obtained an order for sale for the said lands. The defendant applied to this court to set aside the order for sale. The plaintiff opposed the said application, contending that two years had passed since the order for sale was granted and the defendant had not offered any explanation on the delay.

Held:

[1] The defendant did not forward any explanation for the delay or any particular circumstances which would allow the court to set aside the order for sale. The present application was an abuse of court process and was dismissed on this ground alone. It was additionally noted that the plaintiff had applied and obtained the direction on the conduct of the sale of the said lands pursuant to the order for sale. Whilst the defendant had been served with the summons in respect of which the direction had been given, they chose to be absent at the hearing thereof. (p 269 b-c)

[Defendant's application dismissed with costs.]

Case(s) referred to:

Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail [1999] 6 CLJ 405 ***(refd)***
Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466 ***(refd)***
Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Lee Phet Boon v. Hock Tai Finance Corp Bhd [1999] 8 CLJ 318 ***(refd)***
Li Fang Teck & Anor v. Lee Joon Shiew [1999] 6 CLJ 473 ***(refd)***
Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd [2000] 2 CLJ 73 ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor [2001] 4 CLJ 168 ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***
Yang Lak Man v. Yang Paw Man [1999] 7 CLJ 131 ***(refd)***

Legislation referred to:

Land Code (Sarawak), ss. 152, 208(5)
Rules of the High Court 1980, O. 41 rr. 1(1), (2), 4(2), O. 83 r. 3(3), (6)

For the plaintiff - Jagjeet Kaur Sandhu; M/s Awang Lai, Sandhu & Co
For the defendant - Tai Choi Yu; M/s Tai Choi Yu

Reported by M Maheswaran

JUDGMENT

Sulaiman Daud J:

It is to be noted at the outset that the present application was heard together with O.S. No. 24-212-98 (MR), O.S. 24-214-98 (MR) and O.S. 24-266-98 (MR) where the defendant prayed for similar relief to set aside the order of sale and other subsequent orders as set out in each of those application based on similar grounds. The learned counsels for both the defendant and the plaintiff also adopted the submission made in the present application with certain modification according to the facts of each particular case.

In the present application the defendant by way of notice of motion prayed for the following relief against the plaintiff, namely:

(a) that the order of sale dated 6 July 1999 granted by the learned Judicial Commissioner be set aside, struck off or discharged;

(b) that the order made by the learned deputy registrar on 19 June 2000 for the reserve prices to be set at RM69,500 and RM139,000 respectively be set aside, struck off or discharged;

(c) that the order made by the learned senior assistant registrar on 6 July 2001 for the distribution of the proceeds of the alleged auction by tender be set aside, struck off or discharged;

(d) that the purported sale and/or auction by tender held on 26 October 2000 be declared null and void *ab initio* or null and void and/or is a nullity on the ground that the said sale and/or auction was not made in accordance with the law;

(e) that the order of sale made by the learned senior assistant registrar on 12 May 2001 be set aside, struck off or discharged and/or alternatively that the purported date fixed for the sale and/or auction by tender on 30 August 2001 be aborted and/or cancelled and/or terminated.

All the orders sought to be set aside or struck off herein relate to two pieces of land described as Lot 337, Block 2, Miri Concession Land District and Lot 2706, Block 1, Lambir Land (collectively referred to as "the subject lands") that were charged by the defendant to the plaintiff as security for certain credit and other banking facilities granted by the plaintiff to a third party Chai Pak Tuong.

In support of the application the defendant relied on the affidavits of Chai Koh Shon affirmed on 15 August 2001, 17 September 2001 and 27 December 2001 (referred to as the "defendant's 1st affidavit", "defendant's 2nd affidavit" and "defendant's 3rd affidavit" respectively). In opposing the application the plaintiff filed in two affidavits of Norliza Hj Chem both of which were affirmed on 29 August 2001 (referred to as the "plaintiff's 1st affidavit" and "plaintiff's 2nd affidavit" respectively), and another affidavit by their counsel Ms Jagjeet Kaur Sandhu affirmed on 14 February 2001.

The brief facts pertinent to this application are as follows. By a memorandum of charge Instrument No. L. 2702/1995 registered at Miri Land Registry Office on 7 April 1995 ("the said charge") the defendant charged the subject lands to the plaintiff to secure an overdraft facility up to the maximum aggregate sum of RM120,000 granted by the plaintiff to a third party, Chai Pak Tuong ("the borrower"). The defendant undertook to repay on demand all such sums of money which shall be due and owing by the borrower in respect of the said facilities together with interest thereon at the rate as set out in the charge instrument.

When the borrower failed to regularise the amount overdrawn by him under the facilities, the plaintiff through their advocates sent to the defendant and the borrower by registered post notice of demand dated 5 November 1997 for the payment of RM130,852.20 owing as at 30 October 1997. The letter of demand were however returned to the plaintiff's advocates marked "unclaimed" which caused the plaintiff to publish the relevant statutory notice in two consecutive publications of the Gazette of the State of Sarawak pursuant to s. 208(5) of the Sarawak Land Code (Cap 81) ("the Land Code").

On 30 September 1998 the plaintiff commenced the foreclosure proceedings to obtain the order of sale in respect of the subject lands. The originating summons and the notice of appointment to hear the originating summons were personally served on the defendant on 20 November 1998 and 3 February 1999 respectively. When the matter came up for hearing on 30 June 1999 the learned Judicial Commissioner granted the order of sale of the subject lands in the absence of the defendant to satisfy the balance of the principal amount secured by the charge in the sum of RM148,667.72 as at 2 September 1998.

Pursuant to the order of sale the plaintiff took out the summons for direction to give effect to the said order, a copy of which was duly served on the defendant. The said summons was heard before the senior assistant registrar on 30 July 1999 where by an order dated 24 August 1999 the senior assistant registrar directed both the subject lands to be sold by way of public tender at a reserve price of RM69,500 for each lot. However there was no bidder upon the opening of the tender. There was also no bidder when the subject lands were again put up for sale by tender pursuant to another order of the court dated 24 November 1999.

Upon the plaintiff's application, by summons in chambers *(ex parte)* dated 19 June 2000, the learned deputy registrar made another order dated 21 July 2000 for the subject lands to be put up for sale by public tender for the third time at the same reserve price (the order sought to be set aside in (b) above). This time one lot of the subject lands, namely Lot 337, was successfully sold but there was still no bidder for Lot 2706. On 6 July 2001 the senior assistant registrar made the order for the payment out of the purchase money in respect of the said Lot 337 (the order sought to be set aside in (c) above). Pursuant to another application by the plaintiff, on 12 May 2001 the senior assistant registrar made another order

for the said Lot 2706 to be put up again for sale by public tender at the same reserve price of RM69,500 (the fourth order sought to be set aside in (e) above).

I will now consider the application to set aside each of the impugned order.

The Order Of The Learned Judicial Commissioner

The plaintiff in opposing the application to set aside the order of sale granted by the learned Judicial Commissioner ("the first impugned order") firstly contended that the defendant's application is an abuse of the process of the court since there was a long inordinate delay in commencing the application and no explanation was given therefor. In support of the contention the learned counsel first referred to the observation made by Gopal Sri Ram JCA in *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396, where his lordship said, at p. 401, as follows:

> It is a cardinal principle of law, that when a litigant seeks intervention of the court in a matter that affects his rights, he must do so timeously. The maxim, *vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae,* a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render satisfactory explanation for it.

The other case cited by the learned counsel is *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, where Edgar Joseph Jr FCJ observed, at p. 247, as follows:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is irrespective of merits and without terms. Having said that, it should be added that the application to set aside such judgment should be made:
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> (a) within a reasonable promptitude, in other words within a reasonable time; and
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> (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O. 2 r. 2(i) of the Rules of the High Court 1980).

It is without doubt that the two cases cited are directly related to the issue of delay in making an application for setting aside an order of the court. In the present case it is not disputed that the order of sale was made on 30 June 1999 and the present application was filed on 15 August 2001. There was a lapse of almost two years and no explanation was given for the delay.

In the absence of any explanation for the delay or any particular circumstances that could entitle the court to ignore the same, I agree with the plaintiff's contention that the present application is an abuse of the process of the court and should be dismissed on this ground alone. It is also to be noted that pursuant to the said order the plaintiff has applied and obtained the direction on the conduct of the sale of the subject lands. The defendant was also served with the summons in respect of which the direction was given but chose not to be present at the hearing thereof.

I will dismiss the application to set aside the order of sale on the ground of delay alone. However for completeness I will embark to consider the other relevant issues raised by the defendant to set aside the first impugned order.

There were two other grounds advanced by the defendant in support of the application to set aside the first impugned order. Firstly it was contended that the affidavit in support of the originating summons to which the order relates was irregular since it was affirmed one day earlier than the date of filing of the originating summons, and secondly that there has been non-compliance with O. 83 r. 3(3) of the Rules of the High Court 1980 ("the RHC 1980") by reason of the irregular affidavit.

On the validity of the affidavit, in *Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail* [1999] 6 CLJ 405, it was held that an affidavit affirmed one week before the filing of originating summons is inadmissible as there was no cause or matter that has had been registered at the registry of the High Court. However in *Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali* [1999] 6 CLJ 466 Azhar Ma'ah J expressed a different view. In that case his lordship observed that to disallow the supporting affidavit for the reason stated in Arab Malaysian Finance Bhd would militate against the basic principle of justice.

In *Yang Lak Man v. Yang Paw Man* [1999] 7 CLJ 131 Mohd Hishamudin J, in adopting the decision in *Hong Kong Bank Malaysia Bhd*, stated that there is nothing in O. 41 r. 1(1) and (2) of the RHC 1980, either express or by implication, which require the affirmation of the supporting affidavit to be done only after the originating summons have been filed and not

before. Similar view was also expressed in *Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168, *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd* [2000] 2 CLJ 73, *Kewangan Bersatu Berhad v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79, and *Li Fang Teck & Anor v. Lee Joon Shiew* [1999] 6 CLJ 473.

I shared the view expressed in the large number of cases decided by the High Court that an affidavit which was affirmed one day earlier than the issuance of the originating process will not affect the validity of the affidavit. There is no express provision under the RHC 1980 which requires the supporting affidavit to be affirmed only at the time or after the issuance of any originating process. To disallow the use of a supporting affidavit by reason only that it was affirmed one day before the filing of the originating process to which it relates would not only cause unnecessary hardship to litigant but also to give too much consideration to matters concerning technicalities.

With regard to the assertion of non-compliance with the said O. 83 r. 3(3) of the RHC, I find it appropriate to reproduce the said order which provides as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and the chargee with particulars of:
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> (a) the amount of the advance;
>
> (b) the amount of repayments;
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> (c) the amount of any interest or installments in arrears at the date of the issue of the originating summons and at the date of the affidavit; and
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> (d) the amount remaining due under the charge.

Although the said O. 83 r. 3(3) is concerned with claim for delivery of possession but it also applies to claim for payment of money secured by the charge as provided under O. 83 r. 3(6) thereof. The question is whether the said affidavit in support in encl. (2) contained the particulars required under the said O. 83 r. 3(3), and if not what is the effect of such non-compliance. Upon perusal of the affidavit in question it appears to me that the amount remaining due under the charge is clearly stated in para. 9 thereof, being in the sum of RM148,667.72 as at 2 September 1998. Paragraph 10 of the said affidavit provides for the particulars of the state of the account between the chargor and the chargee as follows:

10. The particulars required under Order 83 rules 3(6) and (7) of the Rules of the High Court 1980 in respect of the charge are as follows:

(a) Amount advanced/Utilised under the Overdraft Facility	...	RM120,000.00
(b) Amount outstanding and due (including interest accrued) up to 2 September 1998	...	RM148,667.72
(c) Daily interest chargeable	...	RM 63.32.

The learned counsel for the defendant submitted that since the affidavit was filed one day before the filing of the originating summons there has been non-compliance with O. 83 r. 3(3) of the RHC as it is quite impossible for the learned Judicial Commissioner then to know the specific amount remaining due under the charge to grant the order of sale. The learned counsel for the plaintiff on the other hand contended that the defendant has never disputed the state of the account between the plaintiff and the defendant as reproduced above. He further argued that apart from asserting non-compliance with the said O. 83 r. 3(3) the defendant has failed to give any evidence or particulars in support of such contention.

It is true from the affidavit in support of the originating summons (encl. 2) that the state of the account set out therein did not show the particulars required under para. (c) of the said O. 83 r. 3(3) of the RHC. However the said affidavit has shown how much is being claimed to enable the defendant to contest the same. It appears to me from the order of sale dated 6 July 1999 the learned Judicial Commissioner in granting the said order has taken the amount stipulated in para. 10 of the affidavit in support as the amount outstanding and due under the charge. The defendant did not dispute the correctness of the said amount.

In the absence of any evidence to the contrary the amount as stated in the order of sale must be taken as the correct amount remaining due under the charge at the date specified therein. A mere omission to state the amount of installments in arrears at the date of the affidavit and the date of the originating summons is not in my view such a fundamental defect to render the final order of sale irregular and liable to be set aside *ex debito justitiae*. The defendant has been duly served with the originating summons and the notice of appointment to hear the originating summons but however elected not to take the defence open to him then. Having considered the fact and circumstances of the case as a whole I am of the view that it will be too drastic at this stage to set aside the final order of sale solely on the ground raised by the defendant.

The Order Of The Deputy Registrar Dated 19 June 2000

It appears to me from the affidavit in support that there were three grounds advanced by the defendant for setting aside the order of sale dated 19 June 2000 ("the second impugned order"). Firstly it is alleged that the said order is void *ab initio* since it was made pursuant to an order of sale which in itself is void; secondly the learned deputy registrar has no power and jurisdiction to make the second expugned order; and thirdly the defendant was not given the opportunity to challenge the reserve price of RM69,500 and that the same was below the fair market price.

As regards the first ground, suffice for me to say that there is no basis in such a contention in view of my finding as to the validity of the first impugned order dated 6 July 1999 granted to the plaintiff against the defendant.

I will now come to the second point which relate to the power of the deputy registrar to give direction on the conduct of sale of the subject lands and to fix the reserve price thereof. On this issue the learned counsel for the plaintiff referred to the case of *Lee Phet Boon v. Hock Tai Finance Corp Bhd* [1999] 8 CLJ 318 where the court was posed with the same question as to whether the senior assistant registrar has the power to give further direction on the conduct of the sale. In his judgment Hasan JC stated at p. 326 as follows:

> Under O. 31 r. 2(4) of the Rules of the High Court 1980 it is provided that on the hearing of the summons the court may give such directions as it thinks fit for the purpose of effecting the sale and by virtue of O. 1 r. 4(2) the word 'court' include the registrar (see *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15). It is to be observed that the powers given to the court to give directions for the purpose of effecting the sale is very wide and it is not only confined to the directions as stated in para (a) to (h) of O. 31 r. 2(4). Hence the submission made by the plaintiff that the directions to be given under the said r. 2(4) do not include the fixing the date of sale by auction is untenable.

I fully agree with the finding made by his lordship on the issue raised before him. In the present case the impugned order was made by the deputy registrar and not by the senior assistant registrar. However as can be seen the senior assistant registrar derives his power by virtue of the definition of "court" in O. 1 r. 4(2) of the RHC 1980 which include the "registrar", and under the Courts of Judicature Act 1964 "registrar" is defined to include the deputy registrar or senior assistant registrar. For the reason

stated aforesaid it is without doubt the decision in *Lee Phet Boon* case is also applicable in cases where the direction in respect of the sale is made by the deputy registrar as in the instant case.

I also did not find any merit on the other contention that the defendant was not given the opportunity to challenge the reserve price when the second impugned order was made. It is not disputed that the said order was made *ex parte*. However it is to be borne in mind that such order was not the first one made to effect the sale of the subject lands. The first summons for direction for the sale of the subject lands was first taken out by the plaintiff on 9 July 1999 and the same was personally served on the defendant. The manner of sale and the reserve price to be put in respect of the sale was made pursuant to that summons for direction. Since there was no bidder when the land was put up for sale the same was again put up for sale by another order dated 24 November 1999.

The second impugned order is in fact the third order made to regulate the conduct of the sale. The power of the court, including the deputy registrar, to order the subject lands be again put for sale is expressly provided in s. 152 of the Land Code, which is reproduced as follows:

> 152. When no bid has been made at or above the reserve price, it shall be lawful for the court to adjourn the sale and to order that the land be again be put up for auction with the same or with reduced reserve price:
>
> Provided that in every case it shall be the duty of the court to have the time of the sale be publicly notified by advertisement and in such manner as shall be advisable, or shall be regulated by any rules made under this Code, or by order of the court.

It is also clear from the affidavit affirmed by Ms Jagjeet Kaur Sandhu (encl. 67), the learned counsel for the plaintiff, that the notice of sale of the subject lands was duly advertised in the State Gazette and the newspaper Miri Daily News (see exhs. "JS6" and "JS7" thereof). The proclamation of sale and condition of sale were also posted at the places specified in the order.

Based on the facts aforesaid it is my finding that there is also no merit in the contention that the defendant was not given the opportunity to be heard when the reserve price was fixed. As can be seen the direction on the conduct of sale was made and the reserve price fixed pursuant to the first order of the senior assistant registrar made on 24 August 1999. The defendant chose not to be present at the hearing of the summons for direction when the first direction on the conduct of sale was made. I am

also of the view that there is also no requirement under the said s. 152 for the defendant to be present when the court appoint a new date for the subject lands to be again put for sale.

The Order Of The Senior Assistant Registrar Dated 6 July 2001

The order dated 6 July 2001 ("the third impugned order") was made pursuant to summons in chambers taken out by the plaintiff on 2 March 2001 for the distribution of the proceeds of sale of Lot 337 which has been successfully sold. The defendant challenged the validity of the said order on the ground that the said summons were not served on the defendant at their place of business.

On this issue it was pointed out by the learned counsel for the plaintiff that the said summons were served on the defendant at Lot 1426, Airport Road Junction, Miri-Bintulu Road, being the address furnished by the defendant and stated in the memorandum of charge and the loan documents. Upon perusal of the memorandum of charge it is not disputed that the address of service of the said summons is the same as that endorsed on the memorandum of charge. The defendant on the other hand had failed to show that they have informed the plaintiff the address of their new place of business. In the circumstances it is my finding that the said summons were properly served by the plaintiff to the defendant at their last known place of business, and is consistent with the mode of service stipulated in cl. 58 of the memorandum of charge.

The Order Of Sale Of The Senior Assistant Registrar Dated 12 June 2001

The order dated 12 June 2001 ("the fourth impugned order") was made pursuant to another summons in chambers *(ex parte)* seeking yet another direction that the said Lot 2706 which remained unsold be again put up for sale at the same reserve price as that fixed pursuant to the first direction. It is apparent from paras. 16 and 17 of the affidavit in support that the challenge on the validity of this fourth impugned order was made on similar grounds as those advanced in respect of the second impugned order. For brevity it is sufficient for me to reiterate that the power of the deputy registrar under the RHC 1980 is derived from the definition of "registrar" referred to aforesaid which also include the senior assistant registrar. Accordingly it is also my finding that there is no merit on the challenge mounted by the defendant on the fourth impugned order.

Finally I will deal with the remaining prayer for the sale of Lot 337 held on 26 October 2000 be declared null and void on the ground that it was not made in accordance with the law. It appears to me that the challenge on the validity of the said sale was based on the defendant's earlier contention that the order of sale (the first impugned order) and the order on the conduct of sale (the second impugned order) were void and of no effect. In view of my earlier finding on the validity of these two orders the defendant will also fail in this remaining prayer.

Accordingly for all the reasons stated above, I dismiss the defendant's action with costs to be taxed unless otherwise agreed.